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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 338

In the Matter of

LEON FISCHBEIN,

Petitioner,

—v.—

THE BROOKLYN BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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Petitioner prays that a Writ of Certiorari issue to review, either or both, as may be jurisdictionally necessary or proper, the two orders of the Court of Appeals of the State of New York and the two orders of the New York Supreme Court, Appellate Division, Second Department.

Opinions Below

The order of the Supreme Court, Appellate Division, Second Department, which denied petitioner's application for reinstatement to the bar as an attorney and counsellor at law, rendered no opinion (Appendix A).

The order of the New York Supreme Court, Appellate Division, Second Department, which granted the motion to reargue, and upon reargument, adhered to its original decision denying the motion for reinstatement; and by this

order denied petitioner's motion for permission to examine the report of the Committee on Character and Fitness which was filed with the Court, rendered no opinion (Appendix B).

The petitioner, after filing a notice of appeal to the Court of Appeals of the State of New York, moved for an order directing the New York Supreme Court, Appellate Division, Second Department, to furnish petitioner with a copy of the report of the Committee on Character and Fitness or in the alternative for an order requisitioning the report as filed with the Appellate Division, in order to perfect the appeal and for review by the Court of Appeals. The Court of Appeals considered this motion as a motion for leave to appeal and denied the motion on the ground that only questions of non-reviewable discretion were involved (Appendix C).

A motion to re-argue the preceding motion was made and the Court of Appeals denied the motion for reargument and rendered no opinion (Appendix D).

Jurisdiction

Review in this court is addressed to the two orders of the New York Supreme Court, Appellate Division, Second Department, dated July 12, 1965 and September 20, 1965 and the two orders of the New York Court of Appeals dated December 1st, 1965 and February 17th, 1966.

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3) since the petitioner is claiming denial of due process of law under the 5th amendment to the United States Constitution; that he was subjected to cruel and unusual punishment in violation

of his rights under the 8th Amendment to the United States Constitution; and that he was denied due process of law and equal protection of the law as provided for by the 14th Amendment of the Constitution of the United States.

The jurisdiction of the Court is further invoked on the grounds that he was denied his rights, privileges and immunities under the New York State Constitution, Article I, Sections 1, 5, 6 and 11.

Statement

The petitioner was admitted to practice in the Courts of New York on March 19, 1931 and was disbarred from the practice of law on January 3, 1950 for professional misconduct arising out of an isolated incident which did not constitute a crime.

On May 18, 1964 he made a motion for reinstatement. The Brooklyn Bar Association, although served with a copy of these motion papers, did not serve, file or in any manner enter any objection or opposition to the application.

The New York Supreme Court, Appellate Division, Second Department, made an order referring the application to the Committee on Character and Fitness for the Second Department for

> "(a) Investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law and
>
> (B) For a report setting forth the committee's findings and recommendations" (Appendix E).

Thereafter, in full compliance with the directions of the Committee on Character and Fitness, the petitioner filed

with the said committee a written application together with a written sworn statement and other requested and pertinent affidavits.

On January 19, 1965, under oath, before a sub-committee of the Committee on Character and Fitness, the petitioner testified to facts pertinent to his character and fitness. That subsequently the Committee on Character and Fitness filed its report, and, upon information and belief, found that petitioner possessed the requisite character and fitness for an attorney at law, and recommended that the petitioner be reinstated to the bar. Petitioner has no alternative but to make the foregoing statement upon information and belief because his requests to examine the report, findings, and recommendations of the Committee on Character and Fitness were denied by the Supreme Court, Appellate Division, Second Department, and the Court of Appeals of the State of New York. That at no time in any of the proceedings heretofore had, did the Broklyn Bar Association, or any individual appear or serve any papers in opposition to the application made by the petitioner. However, although petitioner has made this statement in all previous motion papers relative to the examination of the report, at no time did the Courts state that the report was not favorable to the petitioner or that the report did not recommend petitioner's reinstatement to the bar.

On July 12, 1965 the order of the Appellate Division, Second Department, recited, inter alia,

> "that the committee having filed its report and due deliberation having been had thereon, it is ordered that the application be denied" (Appendix A).

The report of the Committee on Character and Fitness is the crux of this petition. It is the contention of the petitioner that in the event the report of this committee recommended petitioner's reinstatement to the bar, then the decision of the Supreme Court, Appellate Division, Second Department, denying the motion for reinstatement was arbitrary, capricious, and denied petitioner due process of law and equal protection of the law (*Willner v. Committee on Character and Fitness, et al.*, 373 U.S. 96).

This petition for Writ of Certiorari is based entirely on the report, findings and recommendations of the Committee on Character and Fitness. It is on this report that the Supreme Court, Appellate Division, Second Department, had deliberated. The said Court stated in its order. . . .

> "and the Committee having filed its report, and due deliberation having been had thereon:
>
> It is ordered that the application for re-instatement as an attorney and counsellor at law be and the same hereby is denied" (Appendix A).

The petitioner moved in the Supreme Court, Appellate Division, Second Department, to reargue the motion for reinstatement and to examine the report and recommendations of the Committee on Character and Fitness. The motion to reargue was granted and when reargued the Court adhered to its original decision and denied the motion to examine the report of the Committee on Character and Fitness (Appendix B).

A Notice of Appeal to the Court of Appeals was then filed. In order to perfect the case on appeal, a motion was made to the Court of Appeals for an order directing the

Supreme Court, Appellate Division, Second Department, to furnish the petitioner with a copy of the report or in the alternative to forward the report of the Committee on Character and Fitness to the Court of Appeals. This motion in effect was never decided by the Court of Appeals, instead the Court considered this motion as a motion for leave to appeal and denied petitioner's motion and his right to appeal to the Court of Appeals (Appendix C).

A motion to reargue was made in the New York Court of Appeals, and the motion was denied with no opinion (Appendix D).

It is the contention of the petitioner that he had an absolute right to appeal from the orders of the Supreme Court, Appellate Division, Second Department, pursuant to the Civil Practice Laws and Rules, Section 5601 (b) 1., in that the said orders were final orders of a matter which originated in the Supreme Court, Appellate Division, Second Department, and there is directly involved the construction of Article I, Sections 1, 5, 6 and 11 of the Constitution of the State of New York and the 5th, 8th and 14th Amendments of the United States Constitution. The petitioner had a right to appeal to the Court of Appeals and did not need permission from either Court in order to prosecute his appeal under the provisions of Civil Practice Laws and Rules, 5601 (b) 1. Therefore, the orders of Court of Appeals deprived petitioner of due process of law.

Questions Presented

1. Was the denial of the petitioner's application for reinstatement to the bar by the New York Supreme Court, Appellate Division, Second Department, arbitrary and capricious as to constitute a denial of due process and equal protection of the law?

2. Was the petitioner denied due process of law and equal protection of the laws when his motion for reinstatement as an attorney and counsellor at law was denied although the Committee on Character and Fitness reported to the Supreme Court, Appellate Division, Second Department that the petitioner presently possessed the requisite character and fitness for an attorney at law?

3. Was the petitioner denied due process of law when, after having filed a Notice of Appeal from the orders of the Supreme Court, Appellate Division, Second Department, the Court of Appeals treated a motion for permission to examine the report of the Committee on Character and Fitness as a motion for leave to appeal and thereby denied petitioner his right to appeal from a final order?

4. Was petitioner denied equal protection of the laws when, after 16 years of disbarment, the Committee on Character and Fitness appointed by the Court, having recommended his reinstatement and although there was no opposition the Court, without any further evidence or hearing, denied the application for reinstatement?

5. Was petitioner denied due process of law when he was denied the right to examine the report and recommendations of the Committee on Character and Fitness

as filed with the Appellate Division, Second Department, in order to perfect an appeal?

6. Was the petitioner denied due process of law by the Court of Appeals in treating the motion to examine the report of the Committee on Character and Fitness as an application for leave to appeal and denying the same?

7. Was the petitioner subjected to cruel and unusual punishment in violation of the 8th Amendment of the United States Constitution when although he established that he presently possessed the requisite character and fitness for admission to the bar as an attorney and counsellor at law, the Court disregarding the report and recommendations of the Committee on Character and Fitness, denied his application?

Constitutional and Statutory Provisions Involved

The case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 1, 5, 6 and 11 of the New York State Constitution; the Civil Practice Laws and Rules of the State of New York, Section 5601; the Judiciary Code of the State of New York, Section 90, subdivisions 1 and 10, the pertinent portions of which are quoted in the appendix F.

Reasons for Granting Writ

The petitioner has complied with the statutory requirements for admission as an attorney and counsellor at law as provided in the Judiciary Law, Section 90, Subdivision 1a and the order denying his application deprived him of due process of law and the equal protection of the law.

The Supreme Court, Appellate Division, Second Department, acted capriciously and arbitrarily in refusing to follow the recommendation of its own Committee on Character and Fitness. This was an abuse of their discretion and constituted denial of due process of law.

The Supreme Court, Appellate Division, Second Department, must follow the recommendations of its own Committee on Character and Fitness that petitioner be reinstated to practice law, unless it directs a hearing at which evidence may be presented pertaining to petitioner's character and general fitness requisite to practice law. In that event, petitioner has a right to be confronted with any witness against him. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96.

No such hearing was directed by the Appellate Division on this application. Consequently, the failure of the Appellate Division to follow the recommendation of its own Committee on Character and Fitness to re-instate the petitioner, constituted a denial of due process of law and equal protection of the laws. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96.

The Court's failure to follow the report and recommendation of its own Committee on Character and Fitness which found that petitioner presently possessed the requisite character and general fitness to practice law constituted cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution and Article 1, Section 5 of the New York State Constitution, the petitioner having been disbarred on January 3, 1950.

In re Sacher v. *Association of the Bar,* 347 U.S. 388;

In re Isserman, 348 U.S. 1 which reversed 345 U.S. 286.

The failure of the Supreme Court, Appellate Division, Second Department, to follow the report and recommendations of its own Committee on Character and Fitness deprived the petitioner of the equal protection of the laws and rights and privileges accorded to him by the 14th Amendment of the United States Constitution and by Article 1, Section 1 of the New York Constitution. Petitioner's unprofessional conduct did not constitute a crime and after a lapse of 16 years the Supreme Court, Appellate Division, Second Department, denied the application for reinstatement. However, in all the following cases this same Supreme Court, Appellate Division, Second Department reinstated disbarred attorneys to practice law although all of them had committed acts which constituted crimes and had suffered a disbarment of less than 16 years:

In re Levine, 284 App. Div. 864, 2nd Dept., reinstated December, 1954. Disbarred October, 1940, 260 App. Div. 1048. Disbarred for participating in in forgery upon a general release and a check.

In re Ray, 275 App. Div. 961, 2nd Dept., reinstated June, 1949. Disbarred May, 1941, 262 App. Div. 30. Disbarred upon his conviction for using the mails to defraud and fraudulent advertising in connection with mortgage certificates.

In re Stern, 275 App. Div. 769, 2nd Dept., reinstated April, 1949. Disbarred February, 1940, 258 App. Div. 1070. Disbarred for using "washed" documentary stamps.

In re O'Connor, 265 App. Div., 1062, 2nd Dept., reinstated 1943. Disbarred 1929, 226 App. Div. 600.

Disbarred for conversion of a substantial part of $5000 from one client and obtaining $150 from another client under false pretences.

In re Mazzaralla, 265 App. Div. 862, 2nd Dept., reinstated 1942. Disbarred 1939, 257 App. Div. 857. Forged the infant's name to the check; and then had the infant make a false affidavit. Forged the name of another client to a check and converted the proceeds to his own use, and other derelictions.

Other courts in other jurisdictions have consistently granted an application for reinstatement of a disbarred lawyer, if after the lapse of reasonable time, he, by his conduct has shown that he is contrite, has reformed and that he possesses the requisite character and fitness for the practice of law.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP D. VITELLO
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Brooklyn, New York, 11201

APPENDIX A

Order of Appellate Division, Second Department, Denying Petitioner Reinstatement

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 12th day of July, 1965.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice.*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of

LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

ORDER DENYING REINSTATEMENT

A proceeding having been instituted upon the petition of Leon Fischbein, verified the 7th day of May, 1964, for an order reinstating the said Leon Fischbein, as a member of the Bar (admitted March 11, 1931—disbarred by order of

Appendix A—Order of Appellate Division, Second Department, Denying Petitioner Reinstatement

January 3, 1950), and for such other and further relief as to the court may seem just and proper, and this court by order dated May 25, 1965 having referred the said application for reinstatement as a member of the Bar to the Committee on Character and Fitness for the Second Judicial District: (a) for investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law; and (b) for a report setting forth the Committee's findings and recommendations; and the Committee having filed its report, and due deliberation having been had thereon:

It is Ordered that the application for reinstatement as an attorney and counselor at law be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk.

APPENDIX B

Order of Appellate Division Granting Reargument and Adhering to Original Decision

At a Term of the Appellate Division of Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th day of September, 1965.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice.*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of

LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

A proceeding having been instituted upon the petition of Leon Fischbein, verified May 7, 1964, for an order reinstating him, as a member of the Bar (admitted March 11, 1931—disbarred by order of January 3, 1950), and this court by order dated May 25, 1965 having referred the said applica-

tion for reinstatement as a member of the Bar to the Committee on Character and Fitness for the Second Judicial District; and the Committee having filed its report, and this Court by decision and order dated July 12, 1965, having denied the application for reinstatement; and the petitioner having moved for reargument of his application for reinstatement and for permission to examine the report of the Committee on Character and Fitness filed with this court on his application, by notice of motion, dated August 26, 1965.

Now on reading and filing the affidavits of Leon Fischbein and James F. Ryan in support of said motion and the motion having been submitted by Mr. James F. Ryan of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the motion for reargument be and the same hereby is granted and,

Upon reargument, the original decision and order, be and the same hereby are adhered to; and it is further

Ordered that the motion to examine the report of the Committee on Character and Fitness be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

APPENDIX C

Order of Court of Appeals of the State of New York Denying Motion

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the First day of December A. D. 1965.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

2 Mo. No. 1045

In the Matter of the Application of LEON FISCHBEIN, for Reinstatement to the Bar,

Appellant,

BROOKLYN BAR ASSOCIATION,

Respondent.

A motion, considered as a motion for leave to appeal from the order of the Appellate Division dated July 12, 1965 denying reinstatement, having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C—Order of Court of Appeals of the State of New York Denying Motion

ORDERED, that the said motion be and the same hereby is denied upon the ground that only questions of non-reviewable discretion are involved.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

APPENDIX D

Order of Court of Appeals of the State of New York Denying Reargument

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of February A. D. 1966.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

1 Mo. No. 203

In the Matter of the Application of LEON FISCHBEIN, for Reinstatement to the Bar,

Appellant,

BROOKLYN BAR ASSOCIATION,

Respondent.

A motion for reargument of a motion which was considered by this Court as a motion for leave to appeal having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D—Order of Court of Appeals of the State of New York Denying Reargument

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEAEON KIMBALL
Deputy Clerk

[SEAL]

APPENDIX E

Order of Appellate Division, Second Department, Referring Application to Character Committee

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department on the 25th day of May, 1964.

Present:

HON. GEORGE J. BELDOCK, *Presiding Justice,*
" HENRY L. UGHETTA,
" MARCUS G. CHRIST,
" SAMUEL RABIN,
" JAMES D. HOPKINS,

Justices.

In the Matter of
LEON FISCHBEIN,

Petitioner,

BROOKLYN BAR ASSOCIATION,

Respondent.

A proceeding having been instituted upon the petition of Leon Fischbein, verified the 7th day of May, 1964, for an order reinstating the said Leon Fischbein, as a member of the Bar (admitted March 11th, 1931—disbarred by order of January 3, 1950), and for such other and further relief as to the court may seem just and proper, and the said pro-

ceeding having come on to be heard by a notice of motion, dated May 7, 1964.

Now on reading and filing said petition, notice of motion, the affidavits of A. Lawrence Acquavella, Louis B. Heller, Anthony J. Di Giovanna, Walter R. Hart, Murray H. Pearlman, Dominic S. Rinaldi, Hyman Barshay, John R. Starkey, Nathan R. Sobel, Monroe Birnberg, Abraham J. Gross, Sol Goldstein, Julius Tanenbaum, Carl E. Haas, David M. Markowitz, Frank P. Plunket, Paul O'Dwyer, Irving Warsoff, Arthur Rosencrans, Leonard Lack, David K. Tuttle, Henry Sugarman, and all the papers filed herein; and the said application having been submitted by Mr. James F. Ryan, attorney for petitioner, and no one appearing for respondent Brooklyn Bar Association, and due deliberation having been had thereon:

It is Ordered that the said application for reinstatement as a member of the Bar is hereby referred to the Committee on Character and Fitness for the Second Judicial District: (a) for investigation and hearing as to whether the petitioner presently possesses the requisite character and fitness for an attorney at law; and (b) for a report setting forth the Committee's findings and recommendations.

Enter:

JOHN J. CALLAHAN
Clerk

APPENDIX F

Statutes Involved

NEW YORK STATE CONSTITUTION

ARTICLE I—BILL OF RIGHTS

Section 1. (Rights, privileges and franchise secured)

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

Section 5. (Bail; fines, punishments, detention of witnesses)

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Section 6. (Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process).

. . . No person shall be deprived of life, liberty, or property without due process of law. . . .

Section 11. (Equal protection of laws; discrimination in civil rights prohibited). No person shall be denied the equal protection of the laws of this state or any subdivision thereof. . . .

CIVIL PRACTICE LAWS AND RULES

SECTION 5601—Appeals to the court of appeals as of right

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the

construction of the constitution of the state or of the United States.

JUDICIARY LAW—Section 90

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the Supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

JUDICIARY LAW—Section 90—Admission to and removal from practice by appellate division

Subdivision 10—

Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by

written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records. Formerly Section 88 amended. . . .

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

Statement

Leon Fischbein, the petitioner herein, was admitted to the Bar of the State of New York on March 19, 1931 pursuant to statute and rules made and provided governing admission of candidates to the Bar.

On January 3rd, 1950, petitioner was disbarred by the Supreme Court of the State of New York, Appellate Division, Second Department, for professional misconduct after a hearing on charges before a Referee appointed by the Court for that purpose and after the Referee filed a report with his recommendations (*Matter of Fischbein,* 276 A. D. 268).

On May 18, 1964, petitioner moved to be reinstated as an attorney and counsellor-at-law in the State of New York. His application was referred by the Appellate Division to its Committee on Character and Fitness and thereafter the petitioner appeared and was examined as to fitness to be reinstated to practice law in New York. The report of the committee was filed with the Justices of the Appellate Division and thereafter the Justices unanimously voted to deny the application on July 12, 1965. Reargument was granted to the petitioner and on September 20th, 1965, the Court adhered to its original decision and denied reinstatement. As part of his motion to reargue, the petitioner moved to examine and inspect the report of the Character Committee. The Court denied this application.

A notice of appeal was then filed by the petitioner to the Court of Appeals of the State of New York and a motion was made in that Court for an order directing the Appellate Division of the Supreme Court to furnish the petitioner with a copy of the report or in the alternative to forward a copy of the report of the said Committee to the Court of Appeals. This motion was treated by the Court of Appeals as a motion for leave to appeal and on December 1, 1965, the Court of Appeals denied the motion on the grounds that only questions of non-reviewable discretion are involved.

Petitioner then moved to reargue the said motion and on February 17, 1966, the Court denied the motion.

This proceeding then followed and the petitioner contends that the denial of his application for reinstatement to the practice of law constitute a denial of due process and the equal protection of laws and the refusal to permit the examination and inspection of the report of the Character Committee constituted a denial of due process and that the treatment of the motion for inspection of the report as a motion for leave to appeal to the Court of Appeals, by the Court of Appeals was a denial of due process.

ARGUMENT

POINT I

The petitioner has not been denied due process.

Under New York Law (Judiciary Law, Sec. 90 (1) (a)), the Appellate Division of the State Supreme Court of each of the four judicial departments in New York has power to admit applicants to the Bar after the State Board of Law Examiners certifies that the applicant has passed the examination (or that an examination has been dispensed with), if it is "satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor at law."

The Appellate Division is required by the New York Civil Practice Law and Rules (Sec. 9404) to appoint a Committee "for the purpose of investigating the character and fitness" of applicants. No applicant may be admitted without a favorable certificate.

The New York Court of Appeals pursuant to its rule-making authority (Judiciary Law, Sec. 53(1)) has promulgated Rules for Admission of Attorneys and Counsellors-at-law which provide, *inter alia,* that every applicant must produce before the Committee "evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law" (Rule VIII-1).

In the instant case, the petitioner was formerly a member of the New York Bar. Charges of professional misconduct were brought against him and a full and open hearing was had in which he was confronted by his accusers and permitted unlimited cross-examination of witnesses and accusers. He was further afforded a full opportunity to be heard and to present witnesses on his own behalf. Thereafter he was disbarred because the charges of unprofes-

sional conduct were proved to the satisfaction of the Referee and the Appellate Division. He now seeks reinstatement to the practice of law and seeks as a matter of right what is, under the circumstances of this case, a matter of favor.

The application was referred by the Appellate Division to the Character Committee for examination into the character and fitness of the petitioner. The Committee is an advisory arm of the Court. It has no existence apart from the Court which creates it and it has no authority except that which is conferred upon it by the Appellate Division. Its findings are neither conclusive nor binding. (*Matter of Cassidy,* 268 A. D. 282, aff'd without opinion 296 N. Y. 926.) The Committee interviewed and examined the petitioner and thereafter filed a report to the Appellate Division. The petitioner concludes (although there is no proof of same) that the report was favorable to him. Thereafter the Appellate Division denied the petitioner's application and denied reinstatement to the practice of law. Petitioner claims that such refusal is unconstitutional as being a deprivation of due process. In support of his position he cites the case of *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96. That case involves a petitioner, a Certified Public Accountant, who was refused admission to practice law in the first instance because it was alleged that certain adverse statements were made about him by an attorney and because of allegedly enmity of another person with whom he had been involved in litigation and who was in the words of the petitioner in the case, "in cahoots" with two members of the Character Committee. He was never confronted by those persons, never given a hearing and never given an opportunity to cross-examine the said persons, and never given an opportunity to refute any charges made against him. It is respectfully submitted that this case is completely different than the case now before the Court. In this case, Fischbein was admitted to

the bar and practiced law. He was disbarred after a full hearing at which all accusers and witnesses were examined and cross-examined by him. He was found to be guilty of unprofessional conduct. There is no requirement that he be given a further hearing on the original charges preferred and proved. Nor is there any accuser, or charge now pending against him, nor any matter before the Character Committee or the Appellate Division which requires a hearing and confrontation of witnesses. The Character Committee interviewed petitioner and thereafter issued a report. At that interview, petitioner was presumably afforded an opportunity to present whatever proof he had, in his favor to justify his reinstatement. Nowhere is there any proof that he was denied a hearing before the Committee and denied due process.

Even assuming, *arguendo,* that the Character Committee reported petitioner is a person of good repute, such a report and finding need not compel a conclusion that petitioner is therefore entitled to be reinstated to the practice of law. The proof of the original charges and the findings and conclusions drawn therefrom by the Appellate Division may be such, and undoubtedly are such, as to forever bar petitioner's reinstatement to practice law. His good repute today does not lead to the conclusion that he is of "good moral character and general fitness requisite for an attorney and counsellor-at-law". Further the Appellate Division is not bound by the findings of the Committee.

In any event, there is no proof of charges or accusations or adverse statements made against him before the Character Committee or elsewhere that require confrontation, cross-examination or a hearing. It is respectfully submitted that the petitioner has not been deprived of due process herein.

POINT II

The refusal or failure to furnish petitioner with a copy of the report of the Committee on Character and Fitness is not a denial of due process.

Sec. 90, Subd. 10 of the Judiciary Law provides that all papers, documents and records of applicants "shall be sealed and deemed private and confidential" except that "upon good cause shown the justices of the appellate division . . . are empowered *in their discretion,* by written order, to permit to be divulged all or any part of such papers, records and documents" (Italics supplied).

Nowhere does the petitioner show "good cause" to release the report of the Committee and consequently by the very terms of the statute, the release of the report is a matter of discretion and the failure to exercise that discretion in favor of the petitioner cannot be said to be a denial of due process.

POINT III

Disbarment of the petitioner is not cruel and inhuman punishment.

As has already been stated, the Appellate Division need not follow any recommendation of the Character Committee and even assuming the Committee reported the petitioner was of good character, the refusal of the Appellate Division, in its discretion, to follow the report and reinstate the petitioner, is not cruel and inhuman. The petitioner has been disbarred for his own misconduct. Disbarment is a permanent punishment. If the disbarring court at any time, grants reinstatement to a disbarred attorney, that is a matter of favor. Its refusal to grant reinstatement cannot be said to be cruel or inhuman.

In the cases of *Sacher* and *Isserman* cited by the petitioner in his brief (*In re Sacher* v. *Association of the Bar*, 347 U. S. 388) (*In re Isserman*, 348 U. S. 1, reversing 345 U. S. 286), it was held in *Sacher* that disbarment for contempt of court was too severe and in *Isserman*, that disbarment by an evenly divided Federal Court would be reversed where the attorney had been disbarred in a State Court for contempt. Neither of these cases are similar to the case of the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 338

In the Matter of
LEON FISCHBEIN,
Petitioner,

—v.—

THE BROOKLYN BAR ASSOCIATION,
Respondent.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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Reply to Respondent's Statement

The respondent sets forth the statement (p. 1)* that the petitioner was disbarred on January 3, 1950 for professional misconduct after a hearing on the charges before a Referee, and after the Referee filed a report with his recommendations. However, respondent failed to set forth those recommendations which are as follows:

> "This court's recommendation is that they** be reprimanded, directed to apologize to Judge Goldstein, District Attorney Miles McDonald, and Assist-

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* (p. 1) refers to page and number of Respondent's Answer.

** "they" referred to the petitioner and his former law partner.

ant District Attorney Nias; be ordered to pay Judge Healey the sum of $450 they received for him, and respondents be suspended for such period or periods as the Appellate Division thinks proper."

The Appellate Division disregarded those recommendations and disbarred the petitioner and his former law partner.

Reply to Point I of Respondent's Argument

The Respondent sets forth the sections of law applicable to the admission of applicants to practice law in New York (p. 3). Petitioner does not challenge the Appellate Division's authority to admit persons to practice law in New York which authority is derived from the statutes stated.

On the contrary, petitioner contends that since this judicial power is specifically created by statute, then the Appellate Division's authority is restricted to rendering decisions which afford all persons similarly situated to equal protection of the law and to due process of law.

In compliance with the provisions of Section 90 of the Judiciary Law, petitioner, after his disbarment in 1950, conducted himself in such a manner as to satisfy the requirements of said section and submitted evidence to the Appellate Division and to the Committee on Character and Fitness that he possessed the requisite character and general fitness for an attorney and Counsellor at law.

Although properly served with copies of the application for reinstatement, neither the Brooklyn Bar Association nor the Appellate Division came forward with any evidence to the contrary.

In fact the respondent concedes (p. 5) that no one appeared to offer any opposition to the application for reinstatement.

Respondent's answer (p. 4) states that the report of the Committee on Character and Fitness is neither conclusive nor binding. Petitioner does not dispute that statement. However, petitioner contends that if the Committee reported that the petitioner presently possesses the requisite character and fitness for an attorney at law, then if the Appellate Division refuses to accept the report of its own committee, it must hold a further hearing where evidence, if available, would be produced to show that petitioner did not presently possess the requisite character and fitness for an attorney at law.

The failure to order such a hearing, before denying petitioner's application, constituted a denial of due process of law.

The argument of respondent on page 4 of its answer that the Appellate Division has the power to admit a person to practice as a "matter of favor" has no basis in law whatever. The Appellate Division has the power to exercise its discretion whether or not to re-admit petitioner to the practice of law, but that discretion cannot be arbitrarily or capriciously exercised and the exercise of this discretion must be based on evidence before it. The petitioner has a constitutional right to the equal protection of the law and to be treated as all other persons similarly situated have been treated, without favor and in accordance with the laws of the State of New York and the Constitution of the United States.

The petitioner concedes that if the report and recommendations of the Committee on Character and Fitness are not favorable to him, then his constitutional rights have not been violated.

On page 4 of the respondent's answer, it is stated:

> "the petitioner concludes (although there is no proof of the same) that the report was favorable to him".

The respondent, even at present, will not affirmatively state whether or not the report is favorable to the petitioner.

Reply to Point II of Respondent's Argument

Under Point II, the respondent on page 6 of its answer, sets forth a portion of Section 90, Subdivision 10 of the Judiciary Law as authority for not disclosing to the petitioner the contents of the report of the Committee on Character and Fitness.

The purpose of the said section is to protect the reputation of attorneys in the event charges against them are not sustained. The statute involved is set forth in the petition for certiorari on page 24. The portion of said section not quoted by the respondent, reads as follows:

> "without regard to the foregoing, in the event that the charges are sustained by the Justices of the Appellate Division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of an attorney, the records and documents in relation thereto shall be deemed public records."

The original disciplinary proceeding in 1950 was conducted as a public hearing. Since the charges were sus-

tained against petitioner in 1950, the record became a public record. There were no other charges brought against the petitioner since 1950.

This proceeding for reinstatement was instituted by the petitioner. The Appellate Division, by its order, referred the application for readmission to the Committee on Character and Fitness to investigate, conduct hearings, and to report with its recommendations. The Appellate Division, after receiving the report and recommendations of the Committee on Character and Fitness, entered an order denying reinstatement and stated therein *"and due deliberation having been had thereon it is ordered that the application for reinstatement as an attorney and counsellor at law be and the same hereby is denied."* (Italics supplied by petitioner)

The Appellate Division, by its original order referring this application to the Committee on Character and Fitness, and its final order predicated on the report of said Committee, has violated the petitioner's constitutional rights to due process of law and equal protection of the law, unless it can be shown that the report of the Committee was unfavorable to the petitioner.

If, therefore, the report and recommendations were favorable to the petitioner, then the order of the Appellate Division denying reinstatement was (1) not predicated on the Committee's report. (2) The Appellate Division acted arbitrarily and capriciously and thereby denied the petitioner due process of law and equal protection of law. Further if Section 90, Subdivision 10 of the Judiciary Law has for its purpose the protection of the reputation of attorneys in the event charges are not sustained, then the Appellate Divi-

sion, by its refusal to make public, or to permit petitioner to examine the report of the Committee on Character and Fitness, defeats that which it seeks to accomplish. If anything, the reputation of the petitioner is further damaged if this report is not made available to him. The refusal to furnish petitioner with a copy of the report of the Committee on Character and Fitness for purposes of appeal and review by higher Courts constitutes a denial of due process of law.

If the report of the committee, upon which the Appellate Division duly deliberated, shows that he does not possess the character and fitness for admission to the practice of law, then certainly the record and documents in relation to this application should be deemed a public record.

Reply to Point III of Respondent's Answer

Under Point III, the respondent's answer states (p. 6) that *"disbarment is a permanent punishment. If the disbarring court at any time grants reinstatement to a disbarred attorney, that is a matter of favor"* (Italics supplied by petitioner).

The Appellate Division does not have any legal right or power to grant "favors". Favors became non-existent with the abolition of "Star Chamber Proceedings" wherein kings and feudal lords granted favors to their subjects and serfs. The Appellate Division has the right, in the proper exercise of its discretion and in accordance with due process of law, to refuse to reinstate a disbarred attorney. However, this discretion must not be arbitrarily, capriciously or whimsically exercised. This discretion must be equally ex-

ercised to all persons similarly situated, without favor and in accordance with due process of law. The courts of our many States have consistently and on innumerable occasions invoked the principle that a disbarred attorney, after a lapse of reasonable time, may be reinstated by the court which disbarred him if at the time of the application for reinstatement he establishes, by his mode of living, and by the testimony of others, that he has rehabilitated himself and that he is possessed of the good moral character requisite for the practice of law.

The Court is respectfully referred to the cases cited on Pages 10 and 11 of the Petition for Certiorari wherein the same Appellate Division of the Supreme Court, Second Department, has reinstated, in less than fifteen years, persons who were disbarred for actions which constituted crimes. The specifications of misconduct for which the petitioner was disbarred did not constitute any crime, but constituted unprofessional conduct.

The California State Supreme Court, in the *Matter of Gaffney,* 171 Pac. 2d, 873; 28 Cal. 2d, 769, stated as follows:

> "* * * the law is interested in the regeneration of erring attorneys; and in the enforcement of a sound discipline, its disposition ought not to place unnecessary burdens upon them. The door of hope should no more be conclusively or finally shut as to them than it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law. Reformation and regeneration are open to any man and, when effected, should merit a just reward * * *".

The petitioner asks this Court to consider the decision of the California Supreme Court and to adopt the reasoning therein.

Neither the respondent nor the Appellate Division can assign any sufficient reason for the continuation of the punishment of the petitioner who, during the past fifteen years, established, by his course of conduct, that he presently possesses the requisite character and fitness for his readmission to the practice of law; and, the continuation of this punishment, especially where others similarly situated who have committed much more heinous offenses, have been reinstated, constitutes cruel and unusual punishment.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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